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THE PRESENT STATUS OF PROHIBITION.

The recent proceeding filed by the State of Rhode Island to test the constitutionality of the Eighteenth Amendment will possibly raise for decision many important questions concerning the validity of this amendment and its proper construction. The legislature of Rhode Island has appropriated $5,000 to cover the expense of contesting the validity of the Eighteenth Amendment. The Supreme Court granted the Attorney-General leave to file suit. The main contention of Rhode Island is that the amendment violates the Tenth Amendment reserving undelegated powers to the states.

In the meantime, the enthusiastic supporters of prohibition should not be too sanguine as to the effect of the Volstead Act decision in the recent case of Hamilton v. Kentucky Distilleries & Warehouse Company, 40 Sup. Ct. Rep. 106. This decision does not determine the constitutionality of the regulations providing for the enforcement of the Eighteenth Amendment. The War-Time Act will continue in force so long as a state of war exists, so that prosecutions for the illegal sale of intoxicating liquors will likely be brought under this Act and will be sustained under the war powers of Congress.

In other words, war-time prohibition is in force as well as prohibition under the Eighteenth Amendment and it is the former that has been sustained and defined by the Supreme Court and not the latter. It has not yet been decided by the Supreme Court that the Eighteenth Amendment has been legally adopted nor that Congress thereunder has the right to define what is intoxicating liquor.

While we believe there is hardly any doubt that the Eighteenth Amendment was legally adopted, and is in full force and effect, we, nevertheless, are of the opinion, that there is some room for arguing the question, whether Congress has the right to define the word "intoxicating" under the Eighteenth Amendment. That is quite a different question from the right of Congress to define intoxicating liquors under the War-Time Prohibition Act. In the latter instance Congress was acting under its war powers, which the Court in the Hamilton case held were at least as far-reaching as the police powers of the state. Under the war power Congress concededly could act with greater freedom than under the Eighteenth Amendment. But when the emergency of war ends, and the War-Time Prohibition Act ceases to operate, Congress will be limited in its powers to deal with the subject of intoxicating liquors by the Eighteenth Amendment.

In the Hamilton case, the Supreme Court declared that the federal government had no police powers and therefore could not, in the absence of a specific delegation of power, regulate the sale of intoxicating liquor. Under the Eighteenth Amendment, however, this authority has been delegated, but it is yet for the Supreme Court to say whether this grant of power gives Congress as much latitude to regulate the sale of intoxicants as it has under its war powers. In one particular, at least, this power seems to be expressly limited in the Eighteenth Amendment by the term "intoxicating." Whether Congress can define this term or whether under the amendment a question of fact is raised to be decided by the jury in every case, is still a question on which many lawyers will hold different opinions.

The question whether the War-Time Prohibition Act was repealed by the adoption of the Eighteenth Amendment has been answered by the Court in the Hamilton case. The Court said:

"Was the Act repealed by the adoption of the Eighteenth Amendment? By the express terms of the amendment the prohi-

bition thereby imposed becomes effective after one year from its ratification. Ratification was proclaimed on January 29, 1919 (40 Stat., part 2, appendix, p. 1942). The contention is that, as the amendment became on its adoption an integral part of the Constitution, its implications are as binding as its language; that in postponing the effective date of the prohibition the amendment impliedly guaranteed to manufacturers and dealers in intoxicating liquors a year of grace; and that not only was Congress prohibited thereby from enacting meanwhile new prohibitory legislation, but also that the then-existing restriction imposed by the War-Time Prohibition Act was removed. See Narragansett Brewing Co. v. Baker & O'Shaunessy, U. S. D. C., R. I., November 12, 1919, 260 Fed.

"The Eighteenth Amendment, with its implications, if any, is binding, not only in times of peace, but in war. If there be found by implication a denial to Congress of the right to forbid before its effective date any prohibition of the liquor traffic, that denial must have been operative immediately upon the adoption of the amendment, although at that time demobilization of the army and the navy was far from complete. If the amendment effected such a denial of power, then it would have done so equally, had hostilities continued flagrant or been renewed. Furthermore, the amendment is binding alike upon the United States and the individual states. If it guarantees a year of immunity from interference by the federal government with the liquor traffic, even to the extent of abrogating restrictions existing at the time of its adoption, it is difficult to see why the guaranty does not extend also to immunity from interference by the individual states, with like results also as to then-existing state legislation. The contention is clearly unsound."

The only effect of the decision in the Hamilton case is that the War-Time Prohibition Act is still in force, that the armistice did not end the war and that, therefore, the Act will continue in force until the President proclaims peace.

Other difficulties arising under national prohibition are difficulties of administration and definition. Congress seems to have overlooked the law requiring retail dealers to pay $25.00 a year for a license. Druggists, who are authorized to sell liquors under the regulations enforcing the Eighteenth Amendment, have refused to handle this business if they have to pay a high license. The druggists are right. To require a druggist to take out a liquor dealer's license is either an imposition or a temptation to ignore the law. A druggist could hardly expect to make a profit selling intoxicating liquor or doctor's prescriptions sufficient to justify the payment of a license fee of that amount.

While we believe that the great majority of the people, including the writer of this editorial, are in sympathy with the purposes of prohibition,—the suppression of poverty, crime and disease, due to drunkenness—yet there are without doubt many beneficial medicinal uses for which alcoholic liquors are adapted and are properly prescribed. It would react very unfavorably on public sentiment if the regulations provided for the enforcement of the Eighteenth Amendment were so stringent that liquors for such purposes should become unobtainable, except at prices which are practically prohibitive so far as the great majority of the people are concerned.

If the Supreme Court should decide that Congress has not the power under the Eighteenth Amendment to define the term "intoxicating," a vast amount of litigation will crowd the dockets of many states, for a few years at least, while juries and judges wrestle with the question, What is an "intoxicating" liquor? If, on the other hand, the Supreme Court should decide that Congress has the right to define the term, "intoxicating," then the question becomes a political one, and Congressmen will be besieged by those who will seek to convince them what per cent of alcohol in a liquor is required to intoxicate. As soon as War-Time Prohibition is ended by the proclamation of peace, the brewers will no doubt

resume the manufacture of beer containing 2.75 per cent alcohol and the fight will be on in earnest.

There is also the question of what is meant by the "concurrent powers" of the state to enforce the amendment. This question, in itself, and by reason of its implication, is one of the most serious and difficult problems that ever confronted the Supreme Court.

NOTES OF IMPORTANT DECISIONS.

ADDITIONAL INSTRUCTIONS TO JURIES AFTER DISAGREEMENT, URGING THEM TO REACH A RESULT.—The judge of a court is more than an automaton. He is charged with the duty of guiding and directing the course of justice through his court; and, while he should express no opinion on the merits of the case, he has a right to direct by suggestions the discussions of the jury in certain channels, and to urge them to reach a verdict. The limits of this power, as well as the basis on which it is justified is clearly set forth in the recent case of Shea v. United States, 260 Fed. Rep. 807. In this case Shea was convicted of murder by the District Court at Valdez, Alaska. He alleged error in the fact that after the jury had been out about 30 hours, the Court summoned the jury and gave them the following instruction:

"You have now been out 30 hours on this case, and while I have no doubt that any differences between you are honest and sincere, I want to call your attention to the fact that in no case can absolute certainty be expected. * * * If a large number or majority are of a certain opinion, the juror dissenting should carefully consider whether his doubt or difference from such opinion is a reasonable one, which makes no impression upon the minds of so many men equally honest and equally intelligent as himself. Upon the question of the expense in the trial of this case, I deem it proper to call your attention to the fact that this case has involved a very great expense upon the government. A large number of witnesses have been called from their homes and business important to themselves already for a considerable time; that they reside at Cordova, and a steamer is expected to pass through Valdez en route to Cordova within the next 12 hours, and there will probably not be another steamer for a week or more; also, in connection with the matter of expense, I call your attention to the difficulty of getting qualified jurors in a case of this kind, in so small a community, after so many have been disqualified, having already been called and excused on this case. We all desire to see justice administered, honestly and fairly. At the same time, justice to both the government and defendant requires that it be not attended with too great outlay or expense. The defendant has already been in custody over six months, and is entitled to have the case speedily determined. I call these facts to your attention as matters for your careful and honest consideration; but I wish to impress upon you that nothing that I have said should be understood as seeking to influence the conscientious and honest opinion which you or any one of you, as reasonable men, may entertain. If you have a reasonable doubt of the defendant's guilt, as the same is defined to you in the instructions already given, you should acquit the defendant; if you have not, you should convict him, and the degree of the crime is a matter which should not cause you to entirely disagree and fail to reach a proper verdict."

In holding that the Court committed no error in giving this instruction the Circuit Court of Appeals (9th Cir.) said:

"We do not think that the instruction here in question was more coercive or more invasive of the province of the jury than the instruction to the jury in United States v. Allis (C. C.), 73 Fed. 182, which was approved in Allis v. United States, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91, where the Court said:

"'It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment.'"

In Allen v. United States, 164 U. S. 492, the Supreme Court approved an instruction in which the jury were told it was their duty to decide the case if they could conscientiously do so, and that they should listen, with a disposition to be convinced, to each other's arguments; that in case the larger number were for conviction, a dissenting juror should consider why, if his doubt was a reasonable one, it made no impression upon the minds of so many other men, equally honest and equally intelligent with himself. The Court said:

"It certainly cannot be the law that each juror should not listen with deference to the arguments, and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment, or that he should close his ears to the arguments of men who are equally honest and intelligent as himself."

Of course, if the court should seek to coerce the jury to reach a conclusion by declaring

that the government was entitled to a decision, without making it clear that an agreement should not be reached in violation of the honest conviction of the jurors or even of any one of them, the verdict would be set aside. Suslak v. United States, 213 Fed. Rep. 913.

IS A LEASE TO SALOON KEEPER VOID WHICH PROVIDES FOR TERMINATION IF SUNDAY LAWS ARE ENFORCED?—It has always been an interesting and somewhat close question to determine to what extent the knowledge of one party to a contract of the purpose of the other to violate the law invalidates the contract. The general rule is that mere knowledge is not sufficient. Both parties must intend to violate the law. This distinction is brought out clearly in the recent case of Hoefeld v. Ozello, 125 N. E. 5, decided by Illinois Supreme Court, where it was held that a lessee of premises in Chicago demised for saloon purposes cannot defeat recovery of rent on the ground that the lease which required him to obey the laws was invalid because it contained a provision allowing the lessee to terminate the term if the Sunday closing law should be enforced in Chicago, for the lease itself did not contemplate any violation of law.

In discussing whether the terms of this lease licensed defendant to violate the law, the Court said:

"We cannot infer from the clause in the lease here in dispute that defendants in error licensed plaintiff in error to violate the Sunday closing law. No decision cited by counsel for plaintiff in error, in our judgment, goes to the length of holding that a covenant of this nature is susceptible of being inferred as a license to violate the law. We do not so construe this clause. It is not a provision for the violation of the law, but states a condition which gave plaintiff in error the option of terminating the lease. If plaintiff in error desired to avail himself of this option, he could have done so by giving notice as provided by the lease. Having failed to do so, he cannot now take advantage of this defense."

Of course, a contract in which it is the clear intention of both parties that one of them shall violate the law is void. Thus if a brewer induced a salesman to undertake to sell liquor in dry territory, or a lease for the express purpose of using the premises as a bawdy house, or an agreement to run vehicles at an excessive rate of speed in violation of a municipal ordinance, and all similar contracts are void. But in such cases both parties intend and encourage the illegal act. The mere knowledge of one of the parties that the other intends to commit a wrong is not sufficient to make the contract void. See Blumenthal v. McWhorter, 131 Ala. 642; Ashford v. Mace, 103 Ark. 114, 146 S. W. 474, 39 L. R. A. (N. S.) 1,104, Ann. Cas. 1914B 804.

In Ashford v. Mace the Court said:

"Here the contract of lease was complete when the parties agreed upon the price to be paid, the time the premises were to be occupied, and when possession thereof was taken under the contract. Although the lessor may have had knowledge that the premises would be used for an immoral purpose, unless, coupled with that knowledge, there was an intention on his part when he executed the lease that the premises should be used for such immoral purpose, the lease contract would not be void. * * * The lessor is not the keeper of the conscience of the lessee, and has no police control over him in such matters, and mere knowledge on the lessor's part that the lessee is going to use the premises for an unlawful purpose does not make the lessor a participant in that purpose; for mere knowledge that the lessee may or will use the premises for an unlawful purpose is not, of itself, sufficient to show that the lessor intended that they must or shall be so used."

NECESSITY OF ALLEGING AND PROVING INTENT IN PROSECUTION FOR HAVING POSSESSION OF COUNTERFEITING DIES.—The necessity of alleging or proving intent in a criminal case is very often puzzling to the lawyer. The decision in the recent case of Baender v. United States, 260 Fed. Rep. 832, makes the distinction to be observed in such cases quite clear. In this case defendant was indicted for having in his possession dies for making United States coins. Criminal Code, § 1669 (Comp. Stat., § 10339), makes such possession unlawful. Is it necessary to allege and prove a criminal intent in a prosecution for this offense? The Court held that criminal intent would be inferred. The Court said on this point:

"It is true that, in all cases in which a specific intent is made part of the offense by the statute creating it, it must be alleged, but in cases where the act includes the intent it is sufficient to charge the offense in the language of the statute, and the intent will be inferred. 22 Cyc. 329; King v. Philipps, 6 East 464; People v. Butler, 1 Idaho 231; People v. O'Brien, 96 Cal. 171, 31 Pac. 45; State v. McBrayer, 98 N. C. 623, 2 S. E. 755. In the case last cited it was said: The intent in a criminal case need be specifically alleged and proven only in the case of offenses where by provision of the statute or by the common law, the intention is essential, or in cases of the attempt to commit a criminal act and the evil intent only can be punished. Here intent must be alleged and proven, but where the act is unlawful of itself, its commission implies an evil intention and intent need not be alleged, or, if alleged, it is a mere formal averment and need not be proven. Commonwealth v. Hersey, 2 Allen (Mass.) 173."

RIGHT OF STATE TO REGULATE DISTRIBUTION OF WATER RIGHTS.

It is the unanimous consensus of authority that the use of water in the arid region of the West, especially for the irrigation and reclamation of land, is a public use, in which the general public are directly interested, and that the state has authority to supervise the distribution of the waters within its boundaries and to deliver them to those having the lawful right to use the same. This is to prevent a conflict of rights and to insure to each owner of a right the uninterrupted enjoyment of his own. There can be no absolute title to the corpus of the water of a stream or other body of water, either by the public or an individual, so long as it flows naturally. It is like the air—a naturally-flowing substance, incapable of absolute ownership. However, a right may be acquired to the use of running water, or to a certain amount of running water, which the law will regard and protect as property. Further than this the law will not, because it cannot, go.[1]

Power of State.—The power of the state over public waters within its boundaries is limited to the enactment and enforcement of such reasonable police regulations as may be deemed necessary to preserve the common right of all.[2]

The method of acquiring the right to the use of water by appropriation is based on the civil law, ancient customs, and the method adopted by the miners in California when all the lands and the streams were in federal ownership. By the federal statute of 1866 free access was permitted to anyone over the lands of the United States for the purpose of posting a notice of the appropriation of water, the owner of the fee (the United States) waiving its rights as a riparian owner; but these rights were not waived as against lands in private ownership. Consequently, there grew up in California, and in other states adopting her system, two conflicting methods of acquiring the right to the use of the public waters. I say "conflicting" advisedly, since it took an Act of Congress to remove the cloud from the water titles of the California miners, and in every other Western state where water titles have been defined and made a matter of record it has required the enactment of a water code that provides for a title based on use.

The leading English case—Mason v. Hill—laid down the doctrine that the use of running water was limited to those past whose land the stream flowed, as a common benefit, to be enjoyed by them equally, with priority to none. Wiel, in his text on water rights in the Western states, says: "The most essential feature of the common law, the exclusion of non-riparian owners of lands from rights to streams on private land, is not changed nor modified in California, but is in force there as in England," and cites Miller and Lux v. Madera Canal Co.[3] as authority. The rule likewise applies in Washington "Any statement that non-riparian owners have rights in streams (except by grant, condemnation and prescription), if meant as a statement of general principle, is not in harmony with the philosophy of the common law."

In Lux v. Haggin the court says: "The right of any riparian owner to restrain the diversion, by other than riparian owners, of water which would, if undisturbed, flow past their lands, does not rest upon the extent to which they have used the water, nor upon the injury which might be done to their present use. Even if these plaintiffs had never made any use of the water flowing past their land, they had the right to have it continued in its customary flow, subject to such diminution as might result from reasonable use by other riparian pro-

(1) "Water is the property of no one, and subject to the regulation and control of the state in its sovereign capacity." 22 Idaho 236, 43 L. R. A. 240.

(2) McLennen v. Prentice, 85 Wis. 427, Kinney 2nd ed., § 334.

(3) 155 Cal. 59.

prietors. This is a right of property, a part and parcel of the land itself, and plaintiffs are entitled to have restrained any act which would infringe upon the right."

In the Madera Canal Co. case the ruling of the court is prefaced on the facts that the river banks through the Miller and Lux property were low and that floods annually overflowed them, and deposited on such land large quantities of fertilizer and enriching materials, increasing their productiveness and enhancing their value. The defendants wished to store such flood waters for use on non-riparian lands. The court held, "That the riparian proprietor is entitled as against the non-riparian taker to the ordinary and usual flow of the stream. There is no good reason for saying that the greatly increased flow following the annually recurring fall of rain and melting snow in a region about the head of the stream is any less usual and ordinary than the much diminished flow which comes after the rains and melting snows have run off. The doctrine that the riparian owner is limited to a reasonable use of the water applies only as between different riparian proprietors. As against an appropriator who seeks to divert water to non-riparian land, the riparian owner is entitled to restrain any diversion which will deprive him of the customary flow of water, which is, or may be, beneficial to his land. He is not limited by any measure of reasonableness."

In this state the courts have followed the above California case and the case of Still v. Palouse Irrigation & Power Co.[4] ruled that, "As between themselves bank owners must make a reasonable use of the waters of the stream. This applies to all uses, irrigation included, but a reasonable use in this state as among water users does not apply as between riparian owners and those using under appropriation." In Longmier v. Yakima Highlands Irrigation Co., in the Superior Court of Yakima County, the court said: "As between a riparian owner and a non-riparian diverter, the doctrine of reasonableness of use has no application."

We shall see that riparian rights are now established in this state side by side with appropriation rights, the former for private lands and the latter for public lands. The law of appropriation is confined to acquisitions on public lands, and the common law of riparian rights is the general law of streams, the banks of which are in private ownership.[5] And, since the rule by the Forestry Department abrogates the statute permitting water appropriations on federal lands, our public waters are practically under control of the bank owners.

Right of Appropriation.—Alongside of these rules laid down by our courts, the Legislature of Washington enacted the following statutes, under which large appropriations of water have been made, and many millions of dollars have been spent both in putting them to beneficial use and developing the country under rights so acquired:

"The right to the use of water in any lake, pond or flowing spring in this state, or the right to the use of water flowing in any river, stream or ravine of this state for irrigation, mining or manufacturing purposes, or for supplying cities, towns or villages with water, or for water works, may be acquired by appropriation, and, as between appropriators, the first in time is the first in right."[6]

"Any person, corporation or association of persons is entitled to take from the natural streams or lakes in this state water for the purposes of irrigation and mining, not theretofore appropriated or subject to rights existing at the time of the adoption of the constitution of this state, subject to the conditions and regulations imposed by law; provided, that the use of water at all times shall be deemed a public use and subject to condemnation as may from time to time be provided for by the Legislature of this state."[7]

(4) 64 Wash. 606.

(5) See Benton v. Johncox, 17 Wash. 277.
(6) L. 91, p. 327, § 1,; Rem.-Bal., § 6316.
(7) L. 99, p. 261, § 1; Rem.-Bal., § 6325.

"All persons who claim, own or hold possessory right or title to any land, or parcel of land, or mining claim within the boundaries of the State of Washington, when such lands, mining claims or any part of the same are on the banks of any natural stream of water, shall be entitled to use of any water of said stream not otherwise appropriated for the purposes of mining and irrigation to the full extent of the soil for agricultural purposes."[8]

"Any person who owns or has the possessory rights to lands in the vicinity of any natural stream or lake, not abutting such stream or lake, may take water from such stream or lake if there be any surplus or unappropriated water in such stream or lake."[9]

Under these statutes it will be observed that there is no law limiting the amount of water that may be filed on from any stream or lake. On some streams the appropriations now on file call for many times the amount of water available, and yet there is no law prohibiting further appropriations, no officer whose duty it is to eliminate excess appropriations and protect water users against future encroachments upon their rights, nor to determine when an initiated right has lapsed.

Rights of Non-Riparian Owners.—The doctrine that a riparian right is a property right, a part and parcel of the land, is acquired when the land is acquired, is not acquired by use and cannot be lost by disuse, has been upheld in California, Washington, Kansas, Montana, North Dakota (Oklahoma possibly) and South Dakota and partially in Nebraska, Texas and Oregon and has been rejected in eleven states as not applicable to arid conditions where irrigation is necessary to the development of the country. Those rejecting it are Colorado, Arizona, Alaska, Idaho, New Mexico, Nevada, Utah, Wyoming, partially in Nebraska, Oregon and Texas, New South Wales, Victoria, Australia and the Northwest territories of Canada, India and Egypt.[10]

Before any irrigation legislation whatever was enacted in Canada, the Canadian government sent a commissioner to the western part of the United States to make a study of our laws. Upon his return this commissioner presented a report in which the first suggestion was: "The total suppression of all riparian rights in water, so that the same, being vested in the crown, may be distributed under well considered governmental control for the benefit of the greatest possible number" The abolition of riparian rights and vesting the absolute control of all water in one strong central authority are the important provisions in the Northwest Irrigation Act.

In states adopting a modern water law, riparian users have been in no way injured, but rather have been given rights as appropriators, said right dating back to the time when they first began to use water beneficially. Their titles have been defined and provide for a definite amount of water, and users were given established priorities. Their rights were made a matter of record and can be abstracted as land titles are. They have a market value, and are saleable because they are definite, and the purchaser has a title that is not open to endless lawsuits.

In § 820, Kinney in substance says: On account of the rapid settlement of the arid country and the great demand for water, it is declared that the time is not far distant when the courts will hold that the riparian owner's right as against that of appropriators above him will depend upon the amount of water which he actually applies to a beneficial use, upon the principle that his right to the water is simply usufructary; and if he does not use the water it is

(8) L. 99, p. 261, § 2; Rem.-Bal., § 6326.
(9) L. 90, p. 707, § 7; Rem.-Bal., p. 6331.

(10) In support of this see 20 Wash. 507; also Kinney on Irrigation and Water Rights, § 1901.

an abandonment of this right, and others may take the water who will use it. This would apply the same rule of use to the riparian claimant as any appropriator.

No good reason can be advanced why such a rule of use should not apply in both cases. The appropriator and the riparian claimant both, either directly or indirectly, acquired their rights to the use of the public waters through federal enactments, one recognized by virtue of the custom of humid England and the other by a custom of all arid regions the world over, and there is no good reason why one should exercise a privilege not enjoyed by the other. In a comparatively recent case[11] the Supreme Court of Washington have indicated their intention to follow such a principle. The court says: "We think it comports with the general policy of the state to hold that this statute contemplated the use by the abutting owner of the water necessary for his present needs and for those that accrue, as he in good faith proceeds with reasonable dispatch to construct the means for applying the water to his adjacent arid lands," water to be used within a reasonable time, say two years.

Dual System of Water Rights.—In those states adhering to the common law rule of riparian rights and by statute providing for the appropriation of water, as in Washington, we have dual systems of law, governing waters, which are antagonistic in principle, and consequently are usually clashing. One exists by virtue of a statute and the other through court decrees. These two systems are antagonistic in their foundation principles, and are therefore antagonistic when it comes to their application. Had the government of the United States taken as much pains in disposing of the waters of the public domain in as uniform and systematic a manner as it did of the public lands in the arid region, over which these waters run, the greater portion of which lands are absolutely worthless without the application of the water, the laws regarding water rights would not be in their present unsettled and inharmonious condition.

At present the appropriators on our streams, in many instances, have filed on more water than the stream can supply; and under the constitution and statute claim the right to beneficially use it all. In opposition to this the bank owners under common law rules claim the right to have all of said waters flow past their lands; and have a right to restrain the diversion of said waters to any lands beyond those owned by the bank proprietors. Mead says: "No one, whether an appropriator or a riparian proprietor, knows definitely how much water he is entitled to, nor how soon he may have to defend his rights in a long and costly law suit."

Eminent Domain.—By statute one wishing to acquire the water rights of a riparian owner for a public use may do so by taking them under an eminent domain proceeding, but only such part of the water as the owner is not now using for irrigation or as will not be needed by him in the future. Kinney on Irrigation and Water Rights[12] says: "That the difficulties in the way of getting the proper defendants in a suit to condemn riparian rights are practically prohibitive against the bringing of such action, although the abstract right to condemn such property may be given by statute, and that, if possible, it would be a vastly expensive proceeding."

In Washington the condemner must first pay for a right of way across riparian lands and then for the use of water in excess of the riparian owner's present needs and any contemplated use that said owner may desire to put the water to within a reasonable time. In other words, the bank owner is presumed to have a right to the use of the public waters of the state in excess of his present and contemplated needs, and if anyone else wants to use such excess he must

(11) 47 Wash. 314.

(12) § 1089.

go to the expense of buying it on a holdup basis or undertaking the herculean task of condemning it. And yet the rights which the purchaser must buy or condemn in order to obtain immunity from injunction are recognized as of no general worth. For, in assessing damages on unused riparian rights in Nebraska the courts have held that where the riparian proprietors were possessed of the naked right to a reasonable use of the waters of a stream, yet where such a right is not coupled with an actual diversion or application of such waters to some beneficial use, the measure of damages for future use, defeated by the taking, cannot be considered.[13]

Under the doctrine laid down in the Still case[14] and recently followed in a case in the Superior Court of Yakima County, every riparian owner on any stream in Washington not only has a right to the use of water for domestic and irrigation purposes, but, as against the appropriator of water, has a right to his method of use, however wasteful that may be. Chandler says: "The conclusion to be drawn from these cases is that the lower riparian owner may not only enjoin the diversion of the natural flow, but may also enjoin the storage of even the flood waters if such storage will result in damages, either present or prospective."

Rights to Store Water Cannot Be Acquired by Condemnation.—Under the riparian doctrine it will be impossible to store the flood waters of our streams for use upon non-riparian lands unless the bank owners are bought off at their own prices. Under our statute and the rulings of our courts, the privilege of storing flood waters to be used on other than riparian lands cannot be acquired by condemnation, because the statute expressly says that the right to condemn riparian rights "Is not intended in any manner to allow water to be taken from any person, that is used by said person himself for irrigation, or that is needed for that purpose by any such person"; and in the cases cited the courts have said "that the flood waters were being used by the riparian owners." In Still v. Palouse Irrigation & Power Co.[15] the court says: "In this case the respondents do not make use of the high waters, and the greatest use and benefit to their land comes from such use." This leaves the riparian owner to sell his flood water rights, or not, as he likes, and at any price he may see fit to ask or accept. Under such conditions, men of ordinary business sagacity will not invest their money in water right projects. Under such a rule of law the rights of all water users, acquired by appropriation, and now put to a beneficial use, are open to attack by any riparian proprietor who may wish to hold up the water level in the stream so it may either flood or "sub" his land.

Investments of Appropriators in Jeopardy.—The following quotation from the brief of defendant's attorney in the Madera Canal Co. case is interesting. He said:

"The interests involved in this suit are of such magnitude, not only as between the parties themselves, but also to thousands of others, and the result reached so disastrous to the defendants, so destructive to the vast and beneficial improvements made by them in good faith and in the belief that the same law as to those matters applied both to the state and government lands in California, so disastrous to the people of a large part of California, and so destructive of all those great interests which have grown up under the irrigation system based upon the doctrine of appropriation to beneficial uses, that we firmly believe your honors will wish, even if in the end you feel compelled to adhere to the views already expressed, to do so only after you have received all the light which the profession can give. No matter how onerous and pressing the duties which devolve upon your honors, there is, we submit, before you no question or business which can compare in public interest to the

(13) McCook Irrigation Co. v. Crews, 70 Neb. 115.

(14) 64 Wash. 606.

(15) 64 Wash. 606.

inquiry whether the decree shall stand which condemns to absolute barrenness the thousands of acres of land reclaimed from the desert by the vast expenditures of the defendants here and now a garden of productiveness and beauty, in obedience to the law of another country, based upon the customs, and arising under conditions the most diverse from ours; whether, in obedience to that law, a large part of this state, after a progress almost unparalleled and improvements made at incalculable cost of labor and treasure, is to be condemned to return to sterility and unproductiveness; whether, in obedience to that law, the wheel of progress is to be turned back and the present prosperity of thousands changed into ruin and poverty that a few men, who happen to own land on the banks below, may enjoy the pleasure of seeing the stream flow as it was accustomed to flow. Your honors will not, we are sure, forget that this decree, if it is to stand, not only overthrows the progress of the past, but puts a perpetual bar upon the future progress and development."

If the rule laid down in Miller and Lux v. Madera Canal Co.,[16] *supra,* and followed in Still v. Palouse Irrigation & Power Co.,[17] is the law then the extract from Mr. Gerber's argument (though gloomy) is entirely applicable to present conditions.

In the Still case[18] the court says: "A riparian owner, such as respondents are here shown to be, has a right to the natural flow of the waters in their natural and accustomed channels without diminution or alteration, subject only to such rights and use in every other riparian owner, a right that is as much included in the ownership of the land as the soil itself, and can no more be interfered with by the act of others. And, while the application of this doctrine has in some of the Western states sometimes been denied, on the theory that the rules of the common law respecting riparian owners were inapplicable to conditions and necessities of the people in the particular localities where the cause of action arose, it has since its first announcement here invariably been upheld in this state, excepting where it has been subjected to a priority of appropriation."

Considering the fact that the great bulk of the water now diverted and used for irrigation purposes in the state was acquired under appropriation statutes, and that millions of dollars have been invested in developing such water rights, and that millions more have been invested by substantial citizens who live under such projects, there would seem to be a legal and moral duty resting upon the state to remove the cloud from such titles, to define them, and to make them a matter of record.

Water Right Litigation.—The history of water rights in those states operating under the common law of riparian rights is that of endless litigation and delay in the development of their natural resources.

In California, following the common law rule, millions of dollars have been spent in water litigation without settling the rights of anybody except those directly parties to the litigation. "Under existing conditions water rights in California cannot be settled until every claimant on each stream and stream system has sued or has been sued by every other claimant thereon."[19] Washington, in adopting the riparian doctrine, has placed every water title in the state in the same jeopardy as those in California.

All water rights in such states are open to attack in the courts, and can never be defined and made definite until each claimant of a water right has sued every other claimant on the stream or stream system, or has been sued by them. And even then there is now nothing but the bringing of another suit to prevent the newcomer from filing an appropriation and using the water of the person having the right to it under the decree.

(16) 155 Cal. 59.
(17) 64 Wash. 606.
(18) Supra.

(19) See Conservation Commissioner Report of California, 1912.

It is readily seen that the cost of such a series of proceedings would be appalling, and even then could arrive at no final results until appropriation laws are amended and riparian rights are defined as to quantity and method of use. O. L. WALLER.

Pullman, Wash.

MASTER AND SERVANT—LIMITING AGENCY.

MOGLE v. A. W. SCOTT CO. et al.

Supreme Court of Minnesota. Nov. 21, 1919.

(Syllabus by the Court.)

174 N. W. 832.

This Court sanctions the doctrine that the head of a family, who provides for the recreation of the members of his family by furnishing an automobile for their use and pleasure, is responsible for its negligent use by any one of the family having his permission to drive it. The doctrine is a development of the rules applicable to the relation of master and servant and principal and agent, and is not to be extended to cases where an employer permits a favored employe to use, for his own pleasure, an automobile kept and ordinarily used in carrying on the employer's business.

LEES, C. Action to recover for personal injuries caused by the negligence of the defendant Sobieski in operating an automobile owned by the defendant A. W. Scott Company.

On July 4, 1917, Sobieski, at the direction of J. Walter Scott, the managing officer of the A. W. Scott Company, took an automobile owned by the company to drive from Minneapolis to Wayzata, where he was to do some work for Scott. When the work was finished Scott directed him to drive the car back to Minneapolis and put it in the company's building, where it was kept, and to which Sobieski had a key. On his return, Sobieski stopped at his house for a noonday dinner and was importuned by his wife to take the car and drive to Minnehaha Park with her and her mother. He at first refused to do so, on the ground that Scott had directed him to take the car back to the place where it was kept. However, he finally yielded to his wife's persuasion, and on the trip to the park negligently ran down and injured the plaintiff. He and the company were joined as defendants.

It was alleged in the complaint that, at the time and place of plaintiff's injury, Sobieski was a servant of the Scott Company, and in the course and scope of his employment, with full knowledge, permission and acquiescence of the company, was using the automobile in the performance of the purpose and uses for which it was intended and kept.

At the trial plaintiff called a witness by whom he sought to prove that on August 8, 1917, in the course of a conversation with Scott concerning insurance of the automobile, Scott said that Sobieski was given more privileges than other employes of the company and had full charge of the car, and that only occasionally would any of the others run it in the business, and never for pleasure; but Sobieski was allowed to use it, and frequently took it for the purpose of driving with his family on Sundays and in the evening, and that he was a reliable, careful driver. An objection to the offer was sustained—the court stating that under the allegations of the complaint, in so far as the company was concerned, plaintiff was confined to proof that Sobieski was using the car in its business and in the course and scope of his employment, otherwise there could be no recovery against it, and that the evidence failed to show that at the time of the accident Sobieski was using the car in the business of the company or within the scope or course of his employment. A verdict in its favor was directed. This appeal is from an order denying a new trial.

This court sanctions the doctrine that the head of a family, who provides for the recreation of the members of his family by furnishing an automobile for their use and pleasure, is responsible for its negligent use by any one of the family having his permission to drive it. The most recent expressions of the court on the subject may be found in Johnson v. Smith, 173 N. W. 675, and Plasch v. Fass (opinion filed October 24, 1919), 174 N. W. 438. The doctrine is a development of the rules applicable to the relation of master and servant and principal and agent, which have been extended to meet a new situation brought about by the invention of the automobile and its common use, with the owner's permission, by the members of his family for whom he has provided it. As was said in Kayser v. Van Nest, 125 Minn. 277, 146 N. W. 1,091, 51 L. R. A. (N. S.) 970, a man may properly make it an element of his business to pro-

vide pleasures for his family, or, as it was put in Denison v. McNorton, 228 Fed. 401, 142 C. C. A. 631, the use of an automobile for the purpose of furnishing the members of the owner's family with outdoor recreation is within the scope of the business of the head of a family analogously to the furnishing of food and clothing or ministering to their health.

We are now asked to extend the doctrine to cases where an employer permits a favored employe to use, for his own pleasure, an automobile kept and ordinarily used in carrying on the employer's business. The request is put upon the ground that, through the medium of automobiles, employers may properly provide "fresh air and pleasures, during their leisure hours, as necessaries for their laboring men," and that in so doing they occupy the same position as the head of a family in similarly providing his wife and children with pleasures of that sort. If we were to hold as requested, it would tend to put an end to the praiseworthy custom of many employers who permit faithful employes to use occasionally, for their personal enjoyment, automobiles kept and ordinarily used in carrying on the employer's business. If this cannot be done without subjecting the employer to liability for damages if his employe is negligent in operating the automobile, few employers will continue to follow the custom. But, aside from this particular consideration, we think both reason and authority are opposed to plaintiff's contention. The extension of the family automobile doctrine to other relationships cannot well be justified upon any principle of the law of master and servant or principal and agent, The owner of an automobile, who loans it to another, to use for purposes personal to the borrower, is neither master nor principal, but merely a bailor, and in law is not chargeable with the consequences of the borrower's negligence while pursuing his own ends in his own way.

For the purposes of the case, we have treated the complaint as broad enough to permit the introduction of evidence tending to show either the use of the automobile by Sobieski in the course and scope of his employment or its use with the permission of his employer for a purpose for which it was kept by the employer.

Order affirmed.

NOTE—*Responsibility of Owner of Automobile for Injury by Another Standing in Peculiar Relation to Owner.*—The doctrine of owner of automobile being liable for injuries by member of family using same for the benefit of such family is as well said in the instant case, "a development of the rules applicable to the relation of master and servant and principal and agent," but that case denies that the logic of such development should be carried further. Why, however, should such logic be thus limited? The true inquiry it seems to me is whether in permission given to a third person to use the automobile any purpose of the owner is subserved, apart from a mere spirit of accommodation to such person.

In Dennison v. McNorton, 228 Fed. 401, 142 C. C. A. 631, Knapper, C. J., speaking for Sixth Circuit of Appeals, says broadly that: "The father is not liable for the son's alleged negligence merely because of such relationship. * * * To have that result the act complained of must have been done within the scope of the son's employment and in conducting what is called the father's business," citing Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N. E. 302, 46 L. R. A. (N. S.) 1091, Am. Cas. 1914C, 1082.

That case, however, holds, as I construe it, that, though an employe may be about his own business, yet if he had authority, express or implied, of the owner thus to use it, this would annex liability. In this case it did not appear that the owner had even any knowledge of such use by his employe.

Thus in Reynolds v. Denholm, 213 Mass. 576, 100 N. E. 1006, the owner was held liable where employe was allowed or suffered by the family, without objection, to use the automobile to go to his meals and to get his laundry, and the injury occurred while he was going for his laundry. The Reynolds case was said by the court to be "clearly distinguishable from the Rivoux case."

So in Cunningham v. Castle, 111 N. Y. Supp. 1057, 127 App. Div. 580, a chauffeur operating an automobile with the knowledge and permission of the owner imposed liability on the owner, though the chauffeur was on his own business.

It seems to me this is a higher test than that stated in Shamp v. Lambert, 142 Mo. App. 567, 121 S. W. 770, and in Moon v. Matthews, 227 Pa. 488, 76 Atl. 219, 29 L. R. A. (N. S.) 856, 136 Am. St. Rep. 902, to the effect generally that the servant, though given permission to use the automobile of his master, this is to be taken as prosecuting the business of the master. It seems to me, that this is a vesting of one's agent with authority and yet confining its exercise by secret or private instructions.

In Daugherty v. Thomas, Mich., 140 N. W. 615, 45 L. R. A. (N. S.) 699, it was held that by statute the owner of an automobile could not be made liable to strangers for injury by the use thereof by persons using it without his knowledge or permission. But that case involved the question of "liability of the owner of an automobile, where the same has been taken without intent to steal the same, but without the knowledge or consent of the owner and without * * * any fault or negligence on his part. We have not here the question of the responsibility, be it moral or otherwise, of the owner of an automobile, who has placed it in the hands of irresponsible persons to use."

No, and we have not the question of such a permission creating an appearance of an agency limited by private instructions.

But this was held differently in Steffen v. McNaughton, 142 Wis. 49, 124 N. W. 1016, 26

L. R. A. (N. S.) 382, 19 Am. Cas. 1227, where proof was let in to show whether a chauffeur was under his contract of employment acting within the scope thereof, but this statement implies that had he here been given by contract the right to use the automobile in and about his own affairs, the master would be held liable. See also Colwell v. Activa Bottle & Stopper Co., 33 R. I. 531, 82 Atl. 388.

In Glassman v. Harry, 182 Mo. App. 304, 170 S. W. 403, the taking out of an automobile by a chauffeur at night contrary to positive orders brings no liability on the owner for injury to a third person. This decision seems to us wrong as a limitation by private instructions on the right of an agent. But the majority of cases seem along this line.

It seems to me, that apart from any question of an automobile being in itself a dangerous thing, that the master cannot put his servant in an apparent exercise of authority and then by private directions put a limitation thereon. It is a general principle of law that an agent to bind his principal need not be acting in strict prosecution of his master's business, but only in the apparent prosecution thereof. C.

ITEMS OF PROFESSIONAL INTEREST.

YOU NEVER CAN TELL.

In Vol. 61, p. 151, we published a poem by William Rogers Clay of Frankfort, Ky. We have been requested to republish this poem. We gladly comply with this request, especially in view of the fact that our supply of the particular number containing this poem has been depleted. Here is the poem:

If you have a subtle feeling for a maiden rich and sweet,
And lay your heart and fortune in a bundle at her feet,
And tell her that you love her in a way that doth amaze,
And think that you will win her with your fascinating ways,
You are sure to read some morning in a paper at the door
The news of her engagement to a man you think a bore;
So you never can tell; you never can tell.

When in your pretty bonnet like the rustle of a wing,
You hear the bee a-buzzin' just as sweet as anything,
And think you'll prove a winner in the face of every doubt,
As the friends you chose for judges will refuse to count you out,
You get the doleful message that, not being in the ring,
The judges, your devoted friends, have done that very thing;
So you never can tell; you never can tell.

When practice is a trifle dull, and purse not fat within,
And you hear a man aproaching with those whiskers on his chin,
Who at once uncorks his charming mouth, and gently turns it loose,
And spoils your rug of velvet with a squirt of "backer" juice,
You feel your blood a-boilin', for you think of murder then,
And tell him you will win his case, for fear he'll squirt again;
But you never can tell; you never can tell.

When you contemplate the picture of your client on the stand,
A-fumbling at those whiskers with his big old horny hand,
And though he's cross-examined by a lawyer just immense,
Arouses all the jury with a feeling quite intense,
You are certain of a judgment for at least ten thousand beans,
The half of which you'll seize upon before it strikes his jeans;
But you never can tell; you never can tell.

When you close your peroration and the jury leaves in tears,
You feel as sure as ever you will have enough for years,
And with rare and fertile fancy build your castles in the air,
And dream of private "yach-its" and a horse or two to spare,
When lo! the door is opened and the jury marches in,
And the clerk he reads the verdict and the other fellows "win;"
So you never can tell; you never can tell.

Cheer up, you say, for we will go and try the court (of) appeals,
Where the judges all are honest and their heads not full of wheels;
So down you go to Frankfort as you do most every time,
With many "cases on-all-fours" and confidence sublime;
But when the news from Frankfort comes that you're no longer it,
You feel like falling on all fours, and braying just a bit,
So you never can tell; you never can tell.

But you console yourself that when this weary life is o'er,
You will gladly be an angel on that bright and shining shore,
A-playin' on a golden harp, with Satan's imps defied,
And eatin' sweet ambrosia with some nectar on the side,
But the keeper at the gate may say, although it hurts him to,
"No bum attorneys enter here," and then—it's hell with you;
So you never can tell; you never can tell.

RESULT OF RECENT REFERENDUM IN THE AMERICAN BAR ASSOCIATION.

A few weeks ago there was submitted to the members of the American Bar Association for their approval or disapproval the following resolutions:

"Whereas, the Constitution of the United States and the Constitutions of the several states contemplate government by and for all the people and not by or for any particular class, group or interest;

"Now Be It Therefore Resolved, That the liberties of the people and the preservation of their institutions depend upon the control and exercise by the federal, state and municipal governments of whatever force is necessary to maintain at all hazards the supremacy of the law and to suppress disorder and punish crime."

We have just been informed by Mr. Charles A. Boston, chairman of the Committee on Publicity, that the result on this referendum so far was as follows:

For the resolution submitted, 6,875.
Against the resolution submitted, 85.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 184.

Compensation; Collections—Division of fees for collections between forwarding and receiving lawyers; disclosure of methods of division to client; disclosure to receiving lawyer of forwarding lawyer's additional charge to client.—A, an attorney in New York, forwards a commercial case to B, an attorney in Detroit. Nothing is said as to the method for fixing the charges of the respective attorneys, but at the close of the case B makes a charge of $250, and, following the usual custom in commercial cases, remits one-third of the $250 to A as the latter's share of the fee. A thereupon charges the client separately $500 for his own services, without disclosing to B that he is making a separate charge and without disclosing to the client that he has received one-third of the $250 from B. Is there any impropriety in A's conduct, either in the dealings with B or in the dealings with his client?

ANSWER No. 184.

(1) In the opinion of the Committee the confidential relation between attorney and client requires that every fact known to the attorney which might affect the judgment of the client as to the reasonableness of A's "separate charge" of $500 should be disclosed by A to the client. It is, therefore, improper for A to conceal from the client that the former has received from B one-third of $250.

(2) In the opinion of a majority of the Committee the implication of the remittance by B is that he assumes that it is A's entire compensation. If A retains the remittance he should disclose to B the fact of his separate fee. But in so answering, the Committee does not recede from its reiterated opinion that the sharing of fees is only justified by sharing either professional services or professional responsibility.

HUMOR OF THE LAW.

"That lawyer made you admit there are a lot of things you don't know."

"He had an unfair advantage. If I had been permitted to ask all the questions I could have done the same thing with him."—*Washington Star.*

"You say the prisoner has been drinking?" asked the judge. "Drinking what?"

"Whiskey, I think."

"You think? Don't you know the smell of whiskey? Aren't you a judge?"

"No, your Honor; only a policeman."—*Lawyer and Banker.*

Visitor—Do the revenue officers bother you much?

Moonshiner—Yes; especially since the country went dry; but I've just had to put my foot down and tell them that I couldn't spare them a drop; I'm just able to take care of my regular customers.—*Judge.*

AN OLDTIMER.

I am an ancient anecdote, 3,000 years of age.
They tacked me on to men of note when Xerxes was a page.
I was well known in Jericho, and cut a dash in Troy
And bobbed up every year or so when Caesar was a boy.

I am an ancient anecdote and I am going still.
I was in use when people wrote with stylus and with quill.
I was a joke that Shakespeare knew and Genghis Khan
And now I s'pose they'll hitch me to some yearling Congressman.

—*Louisville Courier-Journal.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possession**—Color of Title.—A commissioner's deed to a purchaser under a decree of the chancery court was such an appearance of title as to constitute color of title in the grantee.—Miller v. Chicago Mill & Lumber Co., Ark., 215 S. W. 900.

2.——Wild Lands.—Wild and uncultivated lands cannot be made the subject of adversary possession while they remain completely in a state of nature, but a change in their condition to some extent is essential.—Craig-Giles Iron Co. v. Wickline, Va., 101 S. E. 225.

3. **Bankruptcy**—Bulk Sales Act.—Sales by bankrupt, a merchant, to defendant at different time of goods held in job lots held not so out of his usual course of business as to constitute sales in bulk, within Oregon Sales in Bulk Act, as amended by Laws Ore. 1913, p. 538, or as to render such sales void for fraud; it appearing that bankrupt had made similar sales to others at various times during two or three years, and there being no sufficient proof that defendant knew of any fraudulent intent.—Sabin v. Horenstein, U. S. C. C. A., 260 Fed. 754.

4.——Composition.—In view of the provisions of the Bankruptcy Act for compositions, a corporation, though bankrupt, may elect officers and directors while its affairs are being conducted in the bankruptcy court, and such officers and directors may agree to a settlement of claims and distribution of assets in the nature of a composition.—In re O'Gara Coal Co., U. S. C. C. A., 260 Fed. 742.

5. **Banks and Banking**—Certificate of Stock.—The owner and holder of a certificate of bank stock has the right to have it transferred in his name on books of the corporation, and the illegal refusal to do so (being treated as a conversion of the stock) makes the corporation liable for resulting damages.—Citizens' Bank of Maxeys v. Bank of Penfield, Ga., 101 S. E. 203.

6.——Estoppel. — A national bank is not estopped by its purchase and temporary operation of a street or interurban railroad from pleading its want of power to operate such road.—Gress v. Village of Ft. Loramie, O., 125 N. E. 112.

7.——Forgery.—Where name of plaintiff firm on check forged by its confidential bookkeeper, drawn upon defendant bank to order of another bank and deposited in such other bank to credit of plaintiff and paid by defendant, was a clumsy forgery, which could have been discovered by defendant in exercise of ordinary care, the deposit could not be deemed a payment to plaintiff, where payment of the forged check enabled the bookkeeper to cover up his defalcations.—Stumpp v. Farmers' Loan & Trust Co., N. Y., 178 N. Y. S. 811.

8. **Bills and Notes**—Acceleration of Maturity.—Agreement extending time for payment of notes, providing in part that maker shall "pay off and discharge said indebtedness as evidenced by said notes * * * according to their face, tenor and effect" on a date mentioned, held not to affect acceleration of maturity clause in notes.—Earhart v. Robinson, Tex., 215 S. W. 973.

9.——Lex Loci Contractus.—Where a note was executed in Indiana and payable at a bank in Indiana, the rights and liabilities of the parties thereto are governed by Indiana laws, although the note was given for part of the purchase price of Arkansas land and was secured by mortgage on that land.—Magenheimer v. Councilman, Ind., 125 N. E. 77.

10.——Negotiability.—A provision in a note for one year for compounding interest after maturity does not impair the negotiability by introducing an element of uncertainty as to amount.—Fox v. Crane, Cal., 185 Pac. 415.

11. **Boundaries**—Public or Private Way.—Where a deed describes the land conveyed as bounded by or on a public or private way, the line of the granted premises extends to the center of the way, if owned by the grantor, and there is nothing in the deed to show a contrary intention.—McCarthy v. City of Everett, Mass., 125 N. E. 168.

12. **Brokers**—Statute of Frauds.—Where a real estate agent has only verbal authority to find purchasers for land, his written contract, as agent for his principal, with alleged purchasers, is within the statute of frauds and void and cannot be ratified, though the rule would be different if contract were merely voidable and not wholly void.—Halland v. Johnson, N. D., 174 N. W. 874.

13. **Carriers of Goods**—Owner's Risk. — A bill of lading providing that, when goods are received on private or other sidings, they shall be at the owner's risk until the car is attached to a train, does not limit the carrier's liability as a common carrier, but merely defines the time of delivery to the carrier and is valid.—Chickasaw Cooperage Co. v. Yazoo & M. V. R. Co., Ark., 215 S. W. 897.

14.——Penalties.—A state statute subjecting a common carrier, for every offense of demanding or collecting a greater rate than prescribed, to a penalty of not less than $50 nor more than $300 and costs, is essentially penal in such provision, though the penalty goes to the aggrieved passenger, and is to be enforced by private suit, being intended primarily to punish the carrier for taking more than the prescribed rate.—St. Louis, I. M. & S. Ry. Co. v. Williams, U. S. S. C., 40 Sup. Ct. 71.

15. **Charities**—Gift Defined.—A "charity" is a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from disease, suffering or restraint, by assisting them to establish themselves in life, by creating or maintaining public buildings, or by otherwires lessening the burdens of government, and a charitable trust would be one created for purpose of carrying out one or more of these objects.—Northwestern University v. Wesley Memorial Hospital, Ill., 125 N. E. 13.

16. **Chattel Mortgages** — Counterclaim. — Where chattel mortgagee proceeds in claim and delivery and sells the property without having the same at the place of sale, the right of the mortgagor to hold the mortgagee to an accounting for the market value of the property may be made available as a counterclaim in the action for claim and delivery.—Nance v. King, N. C., 101 S. E. 212.

17.——Description of Property.—It is not necessary that property should be so described in a chattel mortgage as to render it capable of identification by the written recitals alone, but a description enabling third persons, aided by inquiries which the instrument suggests, to identify the property, is sufficient.—First Nat. Bank of Washington, Okla. v. Haines, Okla., 185 Pac. 441.

18.——Retention of Possession.—A chattel mortgage not acknowledged in substantial compliance with the statute, where the mortgagor retains possession, is invalid as against the right of third parties or attaching creditors, even though recorded.—J. D. Best & Co. v. Wolf Co., Colo., 185 Pac. 371.

19. **Commerce** — Occasional Transactions. — With respect to goods occasionally carried on a wagon from proprietors of a bottling works in Ohio, into Kentucky in response to orders previously received at the works in Ohio, the proprietors of the works are engaged in "interstate commerce," and not subject to the licensing power of any Kentucky municipality.—Wagner v. City of Covington, U. S. S. C., 40 Sup. Ct. 93.

20. **Constitutional Law**—Due Process of Law. —Where adequate provision is made for the certain payment of compensation without unreasonable delay for property taken, the taking does not contravene due process of law in the sense of the Fourteenth Amendment to the federal Constitution merely because it precedes the ascertainment of what compensation is just.—Bragg v. Weaver, U. S. S. C., 40 Sup. Ct. 62.

21.——Vested Right.—A railroad company, which ran over and killed plaintiff's intestate standing on its track, had no vested right to the defense of contributory negligence.—Chicago, R. I. & P. R. Co. v. Cole, U. S. S. C., 40 Sup. Ct. 68.

22. **Contracts**—Express Contract.—If there was an express contract to pay for the extra work, but the amount was not fixed, plaintiff contractor was entitled to a reasonable sum.—Fortunato v. Cicalese, N. Y., 108 Atl. 183.

23.——Lex Loci Contractus.—Every contract as to its validity and nature—the right, in contradistinction to the remedy—is governed by the law of the place where made, unless to be performed in another place, when it is governed by the law of the place of performance.—Poole v. Perkins, Va., 101 S. E. 240.

24.——Merger.—The law, in the absence of showing of fraud or mistake, conclusively presumes that prior verbal engagements or conversations were merged in a subsequent written agreement.—Ewing v. Bond, Ky., 215 S. W. 934.

25.——Separability.—Where valid and invalid stipulations appear in the same contract, and such stipulations are susceptible of division or separation, the valid stipulations will be enforced.—Smith v. Yost, Ind., 125 N. E. 73.

26. **Corporations** — Foreign Corporation. — Where foreign corporation fails to comply with statute giving it right to transact business within the state, a receiver or a trustee appointed to administer its affairs cannot maintain an action on a claim arising therein.—Lowenmeyer v. National Lumber Co., Ind., 125 N. E. 67.

27.——Individual.—The law is not scrupulously particular in discriminating between the contracts of one who owns practically all the stock of a corporation and controls its affairs, as to whether he executes a contract relating to the corporate business in his individual or in the corporate capacity.—Swartz v. Burr, Cal., 185 Pac. 411.

28.——Misrepresentation.—Where the seller of corporate stock made a misrepresentation of fact as part of the contract of sale, he must be held liable to the buyer, induced to purchase thereby, although he made his representation in good faith, believing it to be true.—Loomis v. Pease, Mass., 125 N. E. 177.

29. **Criminal Law**—Accomplice.—To be an "accomplice" one must be so connected with a crime that at common law he might have been convicted, either as a principal or as an accessory before the fact.—People v. Vollero, N. Y., 178 N. Y. 787.

30.——Evidence.—In a prosecution for aggravated assault on a female child by fondling her person, evidence that defendant had exhibited obscene pictures to prosecutrix at the time of the offense held admissible, as showing intent and as a part of the res gestae.—Sine v. State, Tex., 215 S. W. 967.

31.——Preliminary Examination. — The consensus of the criminal jurisprudence in this country is to the effect that the presence of the convict at the hearing of a motion for new trial is not required, and that, whether testimony be heard or not.—State v. Sharp, La., 83 So. 181.

32. **Damages** — Natural Consequence. — A wrongdoer is responsible for the natural and probable consequences of his wrongful act or omission, whether in contract or in tort.—Williams v. Gardner, Tex., 215 S. W. 981.

33. **Death**—Absence. — Six months' absence does not raise a presumption of death, justifying temporary administration.—In re Chancellor's Estate, N. Y., 178 N. Y. S. 832.

34.——Conflict of Laws.—Statutes of Ohio, giving a cause of action for death, are not regarded in Illinois as against morals or natural justice, or hostile to the general interests of the citizens, and will be enforced, unless enforcement is prohibited by law.—Wall v. Chesapeake & O. Ry. Co., Ill., 125 N. E. 20.

35.——Presumption of.—Unless the facts and circumstances shown are such as warrant a reasonable inference that death took place at some particular time within the seven-year period limited by the presumption of death from absence, death is not presumed before the end of the period.—Dobelin v. Ladies of the Maccabees of the World, Wis., 174 N. W. 897.

36.——Survivorship.—The issue whether a wife survived her husband and their child, who perished with her in a common disaster, must be decided without aid of any legal presumptions; it being a settled principle of the common law that, when several lives are lost in the same disaster, there is no presumption of survivorship by reason of age or sex, or that all died at the same moment.—McComas v. Wiley, Md., 108 Atl. 196.

37. **Divorce**—Cruel Treatment of.—That a husband, considerably older than the wife, was attentive to another woman, distressing his wife, and called her opprobrious names, and said he and his children were very much dissatisfied with the marriage, making plaintiff unwelcome in his home, causing mental suffer-

ing, and requested her to return to her home, was not cruel treatment authorizing a divorce. —Black v. Black, Ga., 101 S. E. 182.

38.——Custody of Child.—In determining custody of an infant child, its interest is the controlling consideration.—Hammond v. Hammond, Neb., 174 N. W. 865.

39.——Desertion.—The period of time preceding the resumption of marital relations by husband and wife living apart cannot be considered to be a part of the two years of willful, continued, and obstinate desertion of one spouse by another required by the statute for divorce. —Hyer v. Hyer, N. Y., 108 Atl. 180.

40. **Eminent Domain**—Private Use. — Condemnation cannot be had for a use which is not public.—State v. Houghton, Minn., 174 N. W. 885.

41. **Equity**—Cancellation. — Having acquired jurisdiction of a suit to cancel a deed, the equity court should administer such relief as appears to be proper in the particular case.—Echard v. Waggoner, Va., 101 S. E. 245.

42.——Complete Relief.—The aim of a court of equity is to administer complete relief in one suit and investigate and determine all matters which form the basis for the complainant's right to relief, and as a general rule the court will, in a single suit, investigate and determine all questions incidental to the main controversy and grant all relief incidental to the accomplishment of the main object of the bill.—Northwestern University v. Wesley Memorial Hospital, Ill., 125 N. E. 13.

43. **Escrows**—Delivery.—A delivery of a deed in escrow cannot be made to the grantee himself, and if so made it at once becomes absolute and divested of the supposed condition.—Chaudoir v. Witt, Wis., 174 N. W. 925.

44. **Executors and Administrators**—Malfeasance.—An administrator's malfeasance in misapplying the proceeds of a sale of realty to pay debts cannot be charged against the purchaser. —Globe Mercantile Co. v. Perkeypile, Ind., 125 N. E. 29.

45. **Fixtures** — Eviction. — One wrongfully evicted is not entitled to recover damages by reason of improvements, which were fixtures of permanent character, and not shown to have been made with the consent of the landlord, or with the understanding that they might be removed from the premises at the expiration of the tenancy.—Williams v. Gardner, Tex., 215 S. W. 981.

46. **Fraud**—Expression of Opinion.—Mere expression of opinion, honestly entertained, do not amount to fraud, but the statement of a fact must be construed as such, even though it partakes in some degree in the nature of an opinion. —Owens v. Norwood-White Coal Co., Ia., 174 N. W. 851.

47.——Fraudulent Representations. — Where one has been induced to enter into a contract by fraudulent representations, the person committing the fraud cannot defeat a claim for damages based thereon by a plea that the party defrauded might have discovered the truth by the exercise of proper care.—Moore v. Beakley, Tex., 215 S. W. 957.

48.——Fraudulent Representations.—The buyer of realty can recover for the seller's false and fraudulent representation of a material fact, relied on by the buyer, that one of the tenants of the realty involved was paying a rental of $25 a month, when in fact he was paying only $18.—Mignault v. Goldman, Mass., 125 N. E. 189.

49. **Frauds, Statute of**—Promise to Pay Debt of Another.—A writing relied on to satisfy the statute of frauds, requiring a promise to pay debt of another to be in writing, must either itself, or in connection with other writings, identify debt which is subject of promise without aid of parol evidence.—Gibson & De Journette v. Graham, Ga., 101 S. E. 194.

50. **Gifts**—Promissory Note.—A promissory note, eexcuted and given to a nephwe as a gift, is unenforceable.—Dougherty v. Salt, N. Y., 125 N. E. 94, 227 N. Y. 200.

51. **Habeas Corpus**—Damages.—Damages are not recoverable in habeas corpus proceedings.— Ex parte St. Onge, Vt., 108 Atl. 203.

52. **Homicide**—Apparent Danger. — Defendant's belief that he was in a place where he had a right to be, does not make his right of self-defense in itself, but goes to rebut his bad faith in bringing on the conflict, and, coupled with the fact that he was so suddenly attacked with a deadly weapon there was no opportunity to escape, perfects his right of self-defense.— Colondro v. State, Ind., 125 N. E. 27.

53.——Intent to Kill.—While to constitute an assault with intent to kill it is necessary for the assault to have been inspired by malice, the malice need not be expressed, but may be implied, and may arise out of the circumstances of the assault.—Slayter v. State, Ark., 215 S. W. 886.

54.——Self-Defense.—One cannot avail himself of a necessity which he has knowingly and willfully brought upon himself, as it is a clear duty to employ all the means in defendant's power to avert the necessity of self-defense.— State v. Morgan, O., 125 N. E. 109.

55. **Husband and Wife**—Confidential Relation. —In transactions between husband and wife, both are subject to the equitable rules controlling persons occupying confidential relations. —Du Bois v. Coen, O., 125 N. E. 121.

56.——Gift Inter Vivos.—In surviving husband's action to recover bank deposits standing in wife's name at time of her death, that husband transferred his checking account to wife's name, and that wife was thereafter in possession of the bank deposit books, held sufficient to establish a completed gift inter vivos by husband to wife.—Wallace v. Watson, Ark., 215 S. W. 892.

57. **Insurance**—Co-Insurance. — Coinsurance clauses may be lawfully inserted in fire insurance policies, and will be enforced by the courts in the absence of any statutory regulations of the subject.—Thompson v. Concordia Fire Ins. Co., Tenn., 215 S. W. 932.

58.——Estoppel.—Employer's liability insurer, which, after an accident to an employe, claimed by insured to be covered by the policy, permitted its physician to take part in treating the employe, undertook to defend action, etc., held estopped to deny liability on any ground that the particular employe was not covered by the policy.—Rieger v. London Guarantee & Accident Co., of London, England, Mo., 215 S. W. 920.

59.——Subrogation.—An insured who pays a judgment for the full amount limited in a liability policy indemnifying against actual loss, or a judgment for a smaller amount than such limited sum, can recover the sum with interest only from the time of such payment, but interest accruing on the judgment pending an appeal therefrom is not an expense or cost of defending the action.—Tulare County Power Co. v. Pacific Surety Co., Cal., 185 Pac. 399.

60.——Vacancy.—Stipulation in policy that it shall be void, if premises become vacant and so remain for more than a certain time, is reasonable and valid, and where premises were destroyed by fire while vacant for a longer time than thereby allowed, the insured, in the absence of a waiver, cannot recover indemnity provided by policy.—Bias v. Globe & Rutgers Fire Ins. Co., W. Va., 101 S. E. 247.

61.——Valid Contract.—If insured accepted policy and executed note for premium merely for purpose of enabling insurer's agent to recover fee paid the doctor for medical examination, and upon agent's promise to return note and take assignment of policy, the policy, not having been delivered for the purpose of making a valid and binding contract of insurance was never in force as a contract of insurance.—McElrath v. Gomer, Ark., 215 S. W. 881.

62. **Landlord and Tenant** — Assignment.— Where a tenant holds under a mere naked assignment of a lease, his liability is limited to occupancy of premises, and terminates with abandonment of possession; the sole basis of his obligation being the privity of estate under Civ. Code, § 22.—Chase v. Oehlke, Cal., 185 Pac. 425.

63.——Lease.—In every lease there must be a lessor, a lessee, and a thing demised, and the existence of the lessee is as essential to the validity of a lease as the existence of a grantee

to the validity of a deed.—Root v. Townsend, Ky., 215 S. W. 936.

64. **Limitation of Actions**—Cutting of Remedy.—While a statute of limitations affects the remedy only and takes away no vested rights, it is not competent for the legislature to cut off the remedy entirely, as this would amount to a denial of justice.—Barnhardt v. Morrison, N. C., 101 S. E. 218.

65. **Master and Servant**—Arising Out of Employment.—Claimant, garbage collector, injured as a result of his horses becoming frightened while he was taking his equipment back to the barn of his immediate employer after having taken his last load for the day to city incinerator, was at the time of the accident performing some service growing out of and incidental to his employment within St. 1917, and 2394—3.—City of Milwaukee v. Fera, Wis., 174 N. W. 926.

66.——Fellow Servant.—While a representative of the master may become a fellow servant, if engaged in a mere operative act, the master never can become a fellow servant.—E. H. Parrish & Co. v. Pulley, Va., 101 S. E. 236.

67.——Independent Contractor.—The right to supervise, control and direct the work is one of the tests for determining whether a person is an independent contractor or an employe, but it is not the sole and only test.—Barrett v. Selden-Breck Const. Co., Neb., 174 N. W. 866.

68.——Master's Promise.—Where a servant receives from the master an assurance of the safety of a given operation, the servant does not assume the risk, unless the danger is so obvious and imminent that an ordinarily prudent person would refuse to do the work.—Day's Adm'x v. South Covington & C. St. Ry. Co., Ky., 215 S. W. 944.

69.——Safe Place.—A coal mine operator, though not an insurer, is bound to exercise reasonable care to maintain the entries as a reasonable safe way, and to see that roof is protected if protection was needed.—Owens v. Norwood-White Coal Co., Ia., 174 N. W. 851.

70. **Mortgages**—Defeasance.—While a mere oral promise or agreement to give a defeasance, if made at time of giving an absolute deed and not performed, will not make the transaction a mortgage, yet if the grantee give such promise before the making of the deed, and evades its performance after receiving the deed, equity will relieve against the fraud and enforce the agreement.—Palmer v. Rotary Realty Co., N. Y., 178 N. Y. S. 813.

71.——Mechanics' Liens.—The lien of a mortgage although avowedly given for improving realty, but not containing covenants provided in Gen. Code, § 8321—1 (106 Ohio Laws, p. 531), is prior to mechanics' and materialmen's liens, if such mortgage was filed for record before work was done or material furnished on the improvement.—Rider v. Crobaugh, O., 125 N. E. 130.

72. **Parties**—Joint Tortfeasors.—The party injured by a tort may sue one or several of the joint participants.—Corsicana Nat. Bank of Corsicana v. Johnson, U. S. S. C., 40 Sup. Ct. 82.

73. **Parent and Child**—Necessaries.—A father is liable for necessaries for the support of a son until he is 21 years of age, but of a daughter only until she is 18, in view of Rev. St. 1909, § 402.—Winner v. Shucart, Mo., S. W. 905.

74.——Support of Child.—A father's obligation is only to support his child at his domicile, and he can be prosecuted for nonsupport only in that parish, though the child and its mother had remained in the parish of their former domicile.—State v. Smith, La., 3 So. 189.

75. **Partnership**—Joinder of Parties.—Where a contract is made by one partner for the firm, and it is shown on its face to be a firm transaction, all partners must join in an action thereon.—Elwood Oil & Gas Co. v. Gano, Okla., 185 Pac. 443.

76. **Rape**—Overt Act.—To sustain a conviction of attempt to have a carnal knowledge of a female under the age of 16 years, there must not only be the intent, but some overt act in furtherance thereof.—Weaver v. State, Okla., 185 Pac. 447.

77. **Reformation of Instruments**—Mistake.—If a writing by oversight, or in advertence, or forgetfulness, on the part of both parties thereto, does not express the real contract, equity will reform it so that the writing may express the proposition upon which the minds of both parties met.—Woods v. Brand, Ia., 174 N. W. 849.

78. **Release**—Consideration.—The promise of a widow, claiming a cause of action for death of her husband arising under Rev. St. 1909, §§ 5426, 5427, not to sue on such cause of action, was a sufficient consideration for a promise to pay her a certain amount monthly for a certain number of years.—Bird v. Bilby, Mo., 215 S. W. 909.

79. **Replevin**—Drunkenness.—Where property is sold by one while mentally irresponsible, because of drunkenness, replevin may be maintained by him without returning the consideration, if he no longer had it when he recovered his mental responsibility.—Van Horn v. Persinger, Mo., 215 S. W. 930.

80. **Sales**—Rescission.—A buyer of goods cannot rescind the sale, where he has failed to return or offered to return them in substantially as good condition as they were at time of purchase, in view of 4 Comp. St. 1910, p. 4664, § 69.—Hirsch v. Berschuur, N. J., 108 Atl. 181.

81.——Sale "F. O. B."—Where goods were bought "f. o. b. cars Jewett, destination weights guaranteed," the place of delivery was Jewett and not the place of destination, ("f. o. b.") meaning "free on board of cars," "free" meaning without expense to buyer, and "on board of cars" showing how delivery is to be made, and, in the absence of any words indicating the contrary, means at the place of sale or the nearest station thereto.—Lee v. Gilchrist Cotton Oil Co., Tex., 215 S. W. 977.

82. **Sequestration**—Limitation of Jurisdiction.—Where the district court was without jurisdiction of an action on notes, wherein it was sought to foreclose a lien on an automobile, the amount involved being less than $500, held, that sequestration proceedings under which plaintiff obtained possession of the automobile were also beyond the jurisdiction of the district court and should be dismissed.—Halff v. Gerson, Tex., 215 S. W. 988.

83. **Specific Performance**—Judicial Discretion.—Specific performance is not a matter of absolute right, but is within the sound discretion of the court.—Wellman v. Virginian Ry. Co., W. Va., 101 S. E. 252.

84. **Usury**—Taint of.—The sale and purchase of property of any kind at a price clearly beyond its value as a condition for making a loan and to enable the lender to obtain more than the lawful rate of interest taints the transaction with usury, within Rev. St. 1913, § 3350.—Sanford v. Hawthorne, Neb., 174 N. W. 863.

85. **Vendor and Purchaser**—Deed in Blank.—Where grantee took a deed in blank and on sale by him filled in the name of his purchaser, the first grantee had an implied equitable lien, though not connected with the record title.—Gray v. Fenimire, Tex., 215 S. W. 956.

86.——Possession on Notice.—Possession by tenant of land purchased December 14, 1916, put the purchasers upon notice, not only of his 1916 lease, but also of his further oral lease for the year 1917.—Frye v. Rose, Miss, 83 So. 179.

87. **Wills**—Confidential Relation.—If a confidential relation between a testatrix and the beneficiary appear, coupled with activity of the latter in the preparation of the will, a presumption of undue influence arises, and the burden is on the beneficiary to show that the testament was not procured by undue influence.—In re Nutt's Estate, Cal., 185 Pac. 393.

88.——Insane Delusion.—An "insane delusion" invalidating a will is much more than bias or prejudice or any merely incorrect mental attitude, but is rather a wholly irrational state of mind on a particular subject, such a mental state as is supported by no evidence whatever, but is purely a product of the imagination.—Trustees of Epworth Memorial Methodist Church v. Overman, Ky., 215 S. W. 942.